IN THE

Supreme Court of the United States

October Term, 1971
No. 71-593

RICHARD HENRY BERG,

Petitioner,

vs.

CALVIN P. SCHMIDT, as Judge of the Municipal Court of the Orange County Harbor Judicial District, State of California,

Respondent.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement of the Case.

On November 24, 1969, in Case No. F-3637 in the Municipal Court of the Orange County Harbor Judicial District, Petitioner upon a plea of guilty to a violation of California Health and Safety Code Section 11530, a Misdemeanor, was granted probation on condition that he "submit to search and seizure upon request of a police officer."

On October 23, 1970, officers of the Newport Beach Police Department, having received information that Petitioner was again dealing with narcotics, went to Petitioner's residence and searched it in reliance upon

the condition of probation. On November 17, 1970, Officer Epstein of the Newport Beach Police Department returned to the residence once more and in reliance on the condition of probation sought and obtained consent to search. In both instances the search revealed numerous items of contraband. In both instances Petitioner was held to answer and was charged by information with several felonies.

In both instances, the California Superior Court suppressed the evidence and dismissed the actions because the condition of probation was too narrow to allow for a search of the residence. The specific facts and findings in the cases are to be found in the records of the California Superior Court of Orange County entitled "*People v. Henry Berg*, No. C-24853" and "*People v. Henry Berg*, No. C-24856."

Subsequently, the Municipal Court of Orange County Judicial District modified the condition of Petitioner's probation to require Petitioner to submit his residence, property and person to search and seizure upon request of any peace officer at any time of the day or night.

Petitioner appealed the modified condition of probation to the Appellate Department of the Orange County Superior Court. The Appellate Department denied the appeal and Petitioner filed for a Writ of Habeas Corpus in the United States District Court, Central District of California. That Court denied the Petition as did the United States Circuit Court of Appeals for the Ninth Circuit.

Questions Presented.

I. Whether California Penal Code Section 1203.1 which provides that the Court may as part of its sentence impose and require "any or all of the above-mentioned terms of imprisonment . . . and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and specifically for the reformation and rehabilitation of the probationer", was unconstitutionally applied by conditioning Petitioner's probation on the requirement that he submit his person, his property and his home to search and seizure upon request by a police officer at any time of the day or night.

II. Whether contraband found pursuant to a search conducted under authority of a waiver of search and seizure rights in return for receiving the privilege of probation can be used as evidence.

ARGUMENT.

I.

Probation Is a Privilege Which a Defendant Has the Right to Refuse, and a Condition of Probation Is Proper so Long as It Is Reasonable and Relevant to the Offense for Which Probation Is Granted.

California Sentencing statutes, subject to specific statutory limitations, allow the Court to suspend the sentence and to place the defendant on probation for a certain period of time on condition that he perform or refrain from performing certain acts. The conditions imposed, to be valid, must be reasonably related to controlling the particular type of criminality to which the defendant, though his conviction, has shown himself to be prone. Thus the Court in *In re Peeler*, 266 Cal.App.2d 483; 488, sets forth the *purpose* of the probationary period as follows:

> "'An integral and important part of the penological plan of California is the discretionary retention in the trial court of jurisdiction over the defendant and the cause of action against him in a large area of crimes by virtue of the probation procedures.' (*People v. Banks* (1959) 53 Cal.2d 370, 383 [1 Cal.Rptr. 669, 348 P.2d 102]) . . .
>
> "The purpose of probation is rehabilitation; and the considerations which influence the granting of it are stated only in the most general terms: 'If the court shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, that court shall have power in its discretion to place the defendant on probation. . . .' (P. C. 1203.)"

In setting forth the scope of the court's discretion concerning the type of conditions the court may impose, *In re Peeler, supra*, goes on to state:

> The judge, notwithstanding a wide discretion vested in him, must consider each application for probation upon its merits. (*People v. Rojas* (1962) 57 Cal.2d 676 [21 Cal.Rptr. 564, 371 P.2d 300].) "Moreover, the determination to grant or deny probation is also one in which the state, as well as the defendants, has an interest within the statutory declarations." (Id. p. 683.) Although the discretion of the trial court in granting probation, and imposing the conditions of probation and in revoking or modifying those conditions (see below) is wide, its powers are not boundless. *Conditions imposed must be reasonable and relevant to the offense for which probation is being granted.* (Emphasis added.)

The same principles set forth above were enunciated by the California Supreme Court in *People v. Mason*, 5 Cal.3d 759, 764, where the court goes on to point out that the defendant has the right to accept or refuse probation. The court states:

> Turning to the question of the validity of the condition as we have interpreted it, we are guided by the principles set forth in *In re Bushman, supra*, 1 Cal.3d 767, 776-777, as follows: "When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 authorizes the court to impose any reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and

> rehabilitation of the probationer." If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence. [Citations.] In such case he may challenge the legality of any proposed conditions of probation on an appeal from the judgment or on habeas corpus." [Citations.]

In conformity with the above authorities the California Courts have held that where as here a defendant has been found guilty of either possession or sale of narcotics or dangerous drugs, the conditioning of a defendant's probation to a requirement that defendant submit to search and seizure is reasonably related to the crime, reasonably designed to avoid future criminality and constitutionally valid. As pointed out in *People v. Mason*, *supra*, at p. 764:

> It seems beyond dispute that a condition of probation which requires a prior narcotics offender to submit to a search meets the test set forth in *Bushman*, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. Indeed, the cases have held that such a condition is reasonable and valid, being "related to [the probationer's] reformation and rehabilitation in the light of the offense of which he was convicted." (*People v. Kern*, *supra*, 264 Cal.App.2d 962, 965; see *People v. Fitzpatrick*, 3 Cal.App.3d 824, 827 [84 Cal. Rptr. 78]; *cf. People v. Oslo*, 50 Cal.2d 75, 103 [323 P.2d 397]; *People v. Williams*, 247 Cal. App.2d 394, 403-404 [55 Cal.Rptr. 550].)

Worcester v. C.I.R., 370 F.2d 713 is of no consequence here since, unlike a condition requiring submission to search and seizure, a condition prohibiting appeal is in no way related to the crime and can in no way further the rehabilitation of a defendant.

II.

Requiring a Defendant to Give Up His Fourth Amendment Rights in Return for Receiving the Privilege of Probation Is Not Unconstitutional.

Petitioner was granted probation on condition that he submit to search and seizure at any time. He was granted a privilege in return for the waiver of one of his rights. The question can thus be restated as follows: Can the court require the waiver of certain constitutional rights in return for the granting of the privilege of probation?

The California Appellate Court in *People v. Williams* (1966), 247 Cal.App.2d 394, 55 Cal. Rptr. 550, concluded in the affirmative. There the defendant had alleged the unconstitutionality of requesting restitution as a condition of probation. After a thorough review of the authorities the court stated:

> From the foregoing it is concluded that the discretion to be exercised in imposing *conditions of probation is not bounded by constitutional limitations*, but by the terms of the statute which authorizes the grant of probation and the public policy of that jurisdiction. (See *Escoe v. Lerbst*, 295 U.S. 490; *Burns v. United States*, 287 U.S. 216) *id.* pp. 307-408.) (Emphasis added)

The reasoning of *Williams*, *supra*, was adopted in *People v. Kern*, 264 Cal.App.2d 962, where the court

specifically upheld a condition of probation similar to that here involved. There the court went on to say:

> "Defendant was granted probation upon condition, among others, that he use no narcotics; associate with no known narcotic users; violate no laws; and submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant. He contends the latter condition is unreasonable and should be stricken.
>
> "In granting probation a court may impose such 'reasonable conditions, as it may determine are fitting and proper for reformation and rehabilitation of the probationer.' (Penal Code Section 1203.1)
>
> "Imposition of the condition that defendant submit to a search by law enforcement officers at any time as a condition to probation does not present a constitutional question. (*People v. Williams*, 247 Cal.App.2d 394, 407, 55 Cal.Rptr. 550)"

In explaining the rationale sustaining the validity of the waiver of a constitutional privilege the court in *Williams, supra*, held that:

> "The answer to this argument is that probation is a matter of grace and cannot be demanded of right, and, whatever may be the rule under other statutes, under our law it is expressly provided that no one shall be put on probation except with his consent. Thus appellant was given the privilege of probation upon certain conditions which he voluntarily accepted.

That same rationale is set forth in *People v. Mason*, 5 Cal.3d 759 where the Court states:

> It should be kept in mind that although the scope of the search in the instant case may have exceeded the permissible limits announced in *Chimel v. California, supra*, 395 U.S. 752, that case acknowledged the existence of "well recognized exceptions" to the general rule requiring a warrant in order to conduct a house search. (P. 763 [23 L.Ed.2d 694].) One of those exceptions, referred to in *Katz v. United States*, 389 U.S. 347, 358, footnote 22 [19 L.Ed.2d 576, 586, 88 S.Ct. 507], is that "A search to which an individual consent meets Fourth Amendment requirements. *Zap v. United States*, 328 U.S. 624. . . ." (See also *Vale v. Louisiana*, 399 U.S. 30, 35 [26 L.Ed.2d 409, 413, 90 S.Ct. 1969].) The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us.

The California probationary aim, when analyzed, is thus similar in structure and scope with that set forth in 18 U.S.C. §3651. And in California as in the Federal Court the granting of probation and the conditions upon which it is granted are matters purely within the discretion of the court having jurisdiction over the convicted defendant (*Cf. e.g. Trueblood Longknife v. United States*, (C.A. Hawaii 1967) 381 F.2d 17 *cert. den.* 390 U.S. 131, 100 L.Ed. 1013.)

In *Toyosaburo Korematsu v. United States*, 319 U.S. 432, 433, 87 L.Ed. 1497, 1498, this Honorable Court described the *status* of a probationer as follows:

> The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the orders of the court. He must obey the terms and conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may, during the probationary period, be required to pay a fine, or make reparation to aggrieved parties, or provide for the support of persons for whom he is legally responsible. 18 U.S.C.A. §724, 7 F.C.A. title 18, §724. He is under the "supervision" of the probation officer whose duty it is to make reports to the court concerning his activities. 18 U.S.C.A. §727, 7 F.C.A. title 18, §727, and at "any time within the probation period the probation officer may arrest the probationer, wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest." 18 U.S.C.A. §725, 7 F.C.A. title 18, §725. These and other incidents of probation emphasize that a probation order is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline." *Cooper v. United States*, (C.C.A. 5th) 91 F.2d 195, 199.

It is axiomatic that Fourth Amendment immunity may be waived in advance of a specific search. Within limits there may be a waiver general as to time of

search for searches to be made by certain public officials. (*Zap v. United States*, 328 U.S. 624 [90 L.Ed. 1477, 66 S.Ct. 1277]; *Bowles v. Miste*, 64 F.Supp. 835; *Bowles v. Curtiss Candy Co.*, 55 F.Supp. 527, 531; *United States v. Rabicoff*, 55 F.Supp. 88; *Tucker v. State*, 244 Md. 488, [224 A.2d 111], cert. denied 386 U.S. 1024 [18 L.Ed.2d 463, 87 S.Ct. 1381]; *People v. Allen*, 407 Ill. 596 [96 N.E.2d 446], cert. denied 341 U.S. 922 [95 L.Ed. 1355, 71 S.Ct. 739]; *Zukowski v. State*, 167 Md. 549 [175 Atl. 595].)

In *Zukowski v. State*, *supra*, the court stated, at page 597: "The search which resulted in the discovery of the defendant's illegal possession of liquor was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining the license. In thus authorizing the search he debarred himself from contending successfully that it was unlawful."

Such waivers are usually with regard to licensees in businesses made subject to search by statute.

Given the above propositions, it cannot honestly be argued that the Constitution of the United States *prohibits* the conditioning of a grant of probation upon relinquishment of Fourth Amendment rights. Chief Justice Hughes in *Burns v. United States*, 287 U.S. 216, 221-222, 77 L.Ed. 266, 268-269 properly sets forth the discretionary power of the sentencing court and states:

> Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement

> that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case; to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best."

The *purpose* of an act allowing probation is thus clear, and *Burns, supra,* aptly states:

> He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

If, as in cases involving the trafficking of contraband a waiver of Fourth Amendment rights is *necessary* to maintain the *control* described by Chief Justice

Hughes in *Burns*, *supra*, the sentencing court cannot be said to have abused its discretion by in effect telling a defendant: "You have a choice. You can go to jail or you can give up certain constitutional immunities." And, once the defendant has accepted the benefit of probation he cannot be heard to complain of the burden imposed by its conditions. As pointed out by the Supreme Court of California in *Mason*, if and *when* the Search and Seizure condition is arbitrarily used by police officers the courts can correct the abuses.

Moreover, to argue that the giving up of a right in return for a privilege is unconstitutional is to avoid reality. Every day, in every walk of life, people are giving up constitutionally protected rights in return for certain privileges. Thus, for example, those working for the federal government pay for their privilege by giving up their right to work to elect the candidates of their choice. Those who work for any state government or for the federal government give up their right to strike in return for the privilege. More important, *every* condition of probation, if analyzed, constitutes a violation of a constitutional right. A jail sentence imposed as a condition of probation violates a defendant's right to personal freedom. A condition requiring a probationer to work at a specific place violates another of defendant's fundamental rights. A condition that defendant not frequent certain places or persons, or that he not hold certain positions violate still other rights. . . . Yet *all* of these conditions have been considered proper if they are reasonably related to the crime involved in the conviction and are reasonably designed to curb future criminal activities (*cf. People v. Osslo*, 50 Cal.2d 75, 127; *People v. Williams*, *supra*). And the requirement that probationer report

monthly has been considered as implying a valid waiver of a probationer's rights under *Miranda v. Arizona*, 384 U.S. 436. (*People v. Hamilton*, 260 Cal.App.2d 103.) And *People v. King*, 267 Cal.App.2d 814, 823, *cert. den.* 90 S.Ct. 576, 396 U.S. 1028, 24 L.Ed.2d 514 found proper a condition of probation limiting the defendant's constitutional right to assembly and stated:

> A reading of the record makes the purpose of the disputed condition obvious. Since defendant was guilty of crimes growing out of a demonstration and had suffered a prior conviction arising out of one, it was not improper that restraint was placed on such activity.

III.

Waiver of Immunity From Search and Seizure Renders the Evidence Admissible in Any Proceeding.

While the issue of whether evidence found through a search conducted pursuant to a condition of probation waiver of search and seizure rights is admissible evidence of the commission of a new and different crime is not properly before the Court because not in issue in this case, Respondent submits that Petitioner's hinted-at argument that the evidence so obtained should not be made admissible in the prosecution of a new and different crime is not well founded. Respondent respectfully advocates the application of the familiar rule that probable cause for search exists whenever there is probable cause for an arrest. In the case of a probationer, probable cause for an arrest is supplied by suspicion plus knowledge that the person is on probation (See California Penal Code 1203.2; *cf. People v. Osslo*, 51 Cal.App.2d 380; *People v. Heuz*, 253 Cal.App.2d 986) and by analogy, knowledge of the

existence of a search and seizure condition of probation is thus sufficient to give the officers probable cause to search the probationer. Evidence so obtained is legally admissible for all purposes. To hold otherwise would in fact nullify the condition since *illegally* seized evidence is admissible in all probation revocation hearings regardless of whether the condition concerning search and seizure has been imposed or not.

For all the above reasons, Respondent urges This Honorable Court to deny the Petition.

Dated this 9th day of February, 1972.

Respectfully submitted,

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